In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 18

UTAH PIE COMPANY

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY AND PET MILK COMPANY

PETITION FOR REHEARING ON BEHALF OF CARNATION COMPANY

Respondent Carnation Company prays that this Court grant a rehearing as to Carnation Company of its order of April 24, 1967, reversing the judgment of the Court of Appeals of the Tenth Circuit.

REASONS FOR GRANTING REHEARING

I.

In its opinion as to Carnation, this Court has held that a multi-market seller, whose prices in a given market are undercut by the prices of competitors in all but three weeks of a period of 44 months, whose share of that market declines during the period from 10.3 per cent to 8.8 per cent while two other sellers continuously share from 69.8 per cent to 82.9 per cent of that market, and whose volume of sales in that market shrinks in the last year while the market as a whole grows in that year by nearly one-fourth, can be found to have injured competition in violation of section 2(a) of the Robin-

son-Patman amendments to the Clayton Act simply because its prices in the latter part of the period were less than fully allocated cost (regardless of the reasons) and were at times less than its prices in some other markets (again regardless of the reasons or the lack of any nexus between the markets or the price differences), and because for *three weeks only* they were less than the prices of competitors in that market.

This decision, we submit, outlaws what can only be regarded as a most modest, if not minimal, competitive effort. That is bad law and worse economic policy. The case against Carnation should be reconsidered.

What *should* Carnation have done in the Salt Lake market? The Court's answer to that question imposes a standard of "lawful" competition which is tantamount to no competition at all. In 1960 and 1961 Carnation was undersold consistently in the Salt Lake market by as much as $1.12 per dozen;[1] its relatively high prices limited its sales volume to one-fourth that of Utah Pie in 1960 and one-fifth that of Utah Pie in 1961, and produced substantial reductions in sales volume in 1961 and 1962. For Carnation to have effected the substantial increases in its prices dictated by this Court's opinion, would have been for Carnation to have extinguished itself as a competitor in the Salt Lake market.

The true economic effect of the Court's return to the long discarded mill net returns approach and its insistence on uniform pricing in all markets regardless of the state of competition in such markets is to read section 2(b) out of the act and to give each market its own artificial tariff wall. These standards for section 2(a) would insulate the dominant local

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[1]By Frost 'N Flame in August and September, 1960. R. 4529, 5780. Compare pp. 19, 20 and 22 of Carnation's brief. For a mere three weeks in February and March, 1960, Carnation was the low-priced seller.

seller, Utah Pie Company — itself a flagrant price discriminator and the market's leading price cutter — from *any* meaningful price competition. For not only each of the respondents, but *every* other competitor of record in the Salt Lake City market was an out-of-state concern struggling to sell its products in the face of the rock-bottom price structure initiated and maintained by Utah Pie. It is a strange application of the antitrust laws that grants one seller a local monopoly and postulates that those who unsuccessfully challenge its low prices do so at their peril if they happen to sell in more than one market.

At page 17 of its opinion, the Court finds the frozen pie market in Salt Lake City was "highly competitive," and that all sellers, *including the plaintiff*, contributed to the declining price level. Despite its finding that competition caused the price decline, the Court equates such decline with the erosion of competition, which it holds a jury "could rationally attribute" to price discrimination. All this rationale does is outlaw price competition. What this Court has consistently held the Sherman Act was designed to promote, it now finds the Robinson-Patman Act to proscribe.

The implications of this Court's decision are, of course, not limited to the immediate parties. It stands as a warning to all sellers who, like Carnation, would seek a foothold in any market by means of a special introductory offer or who would strive to retain a modest share of that market by following competitors' price declines. In its ultimate effect it will tend to stifle competitive effort, rigidify prices among unrelated markets and create a local monopoly with the resultant raising of costs to the consumer. It was precisely these evils that the basic antitrust law — the Sherman Act — was enacted to prevent.

II.

The section 2(a) cases against each of the respondents were joined for trial by means of a conspiracy claim, which was ultimately rejected by the jury. In both courts below, Carnation urged that this joinder and the intermingling of the evidence against all three defendants blurred the real issues as to Carnation and deprived it of a fair trial. Even in the opinion of this Court, primary attention is given petitioner's case against the other respondents, and the Court's brief analysis of the case against Carnation so frequently misstates and inaccurately characterizes the facts as to suggest that the evidence against Carnation alone was not given a careful and isolated analysis. The critical need for such analysis warrants a rehearing as to Carnation alone.

In countless small ways the Court's opinion exaggerates Carnation's strength as a force in the Salt Lake market. The Court cites Carnation's 10 per cent market share in 1958 to show that Carnation's discounts were "not unsuccessful," ignoring the fact that its volume that year was cut by more than one-third from 1957 in a growing market (R. 5775), while Utah Pie itself seized a 67 per cent share by selling at prices well below all others. A volume increase of 64 per cent in 1959 is stretched by the Court to "nearly 100 per cent"; Carnation's decline to 8.6 per cent of the market that year is characterized as "temporary," whereas an equally temporary *rise* the following year is called a "turnaround year," implying permanent change.[1] Indeed, the fact that Carnation in 1961 lost virtually all of its 1960 gain is totally obscured by the Court's conclusion, simply, that in 1961 "Carnation's po-

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[1]To term 1960 a "banner year" because Carnation's market share rose a mere 3.5 per cent; is to ignore all perspective. Utah Pie, which grew by 11 per cent of the market, outsold Carnation 4 to 1 that same year.

sition remained important." Likewise, the Court gives Carnation's practical disappearance from the market in 1962 no attention at all.

The Court's discussion of Carnation's special introductory offer in early 1960 is infused with similar hyperbole. In the Court's language, it involved a "slash" in price to a level "well below" the prices of others. The simple facts that this offer lasted only three weeks and that for the remaining 43 months and one week, some *other seller* (nearly always Utah Pie) *undercut Carnation* are ignored. By terming this three-week offer a "new pricing policy," the Court's opinion creates the definite impression that it concluded that throughout 1960 and 1961, *Carnation* was the price leader. Such is contrary to the fact.

The cumulative effect of these numerous minor distortions is to give to Carnation a wholly unwarranted significance as a market force. For example, the opinion cites as evidence of competitive injury the decline in market shares of the non-party sellers from 12.7 per cent in 1960 to 8.2 per cent in 1961, and the corresponding decline in their volume while the market as a whole experienced a significant growth. Yet on the following two pages, Carnation is cited as a *contributor* to competitive injury, whose market position in 1961 "remained important," even though *Carnation in those years suffered a decline in both share of the market and absolute sales volume which was virtually identical to the loss of the "all other" sellers.*

In its discussion of Carnation's price differences, its sales below fully allocated cost and the impact of its prices on the Salt Lake market, some of the Court's misstatements of facts are so critical that each one, considered alone, is sufficient reason for the case to be reheard.

The Court's statements, that in 1960 there were "eight months during which [Carnation's] prices in Salt Lake City were lower than prices charged in other markets" and that in "each" of the first eight months of 1961 "the Salt Lake City prices charged by Carnation were well below prices charged in other markets," are simply untrue unless they mean that the Salt Lake prices were lower than prices charged in *some* other markets, but not all. Carnation's Salt Lake prices in 1960 were decidedly higher, on the whole, than its prices that year in Phoenix, Seattle, Denver, Dallas and St. Paul, and somewhat higher on the whole than its prices in San Francisco and Los Angeles. They were lower, on the whole, than its prices in only one market of record — Spokane (R. 5767-5774). In 1961, too, despite the fact that Carnation's Salt Lake prices were relatively lower than in 1960, they remained higher than its prices in Denver, higher than its prices in Dallas and higher than its prices in St. Paul. There was simply no pattern in those years of a predominance of low prices in Salt Lake and high prices everywhere else.

The Court cites evidence, "simply overlooked" by the Court of Appeals, "from which the jury could have concluded that throughout 1961 Carnation maintained a below-cost price structure." If, by "cost," the Court means "fully allocated" costs, the evidence as to cost is irrelevant; for it is within the legitimate business interests of any multi-market seller to maintain a sales effort so long as those sales contribute to general company overhead. But if, by "cost," the Court means Carnation's direct costs, the statement is incorrect. The only evidence of record that Carnation in 1961 sold below its direct cost is plaintiff's Exhibit 28, a table prepared by petitioner's accountant. The correction of just one of the many egregious errors in this exhibit would transform Carnation's "losses" in-

to profits: the substitution of Carnation's *real* selling prices for the hypothetical prices shown on Exhibit 28 (compare R. 2185 with R. 5780-5782). The Court of Appeals was not hoodwinked by such statistical nonsense; neither should be this Court.

Finally, in its statement that the impact of Carnation's special introductory offer in early 1960 was "felt immediately and the two other major sellers reduced their prices," the Court is simply mistaken. Pet had reduced its price four days *earlier*[1] and the Utah brand was not changed at all. Utah Pie's Frost 'N Flame, introduced one week after Carnation's offer was *withdrawn* (R. 4528, 5761, 5779), appeared as a cut-rate private label for one buyer only, not to meet a competitive situation.

The fact that Carnation was in the market and was joined in this suit in an unsuccessful effort to establish a conspiracy seems to be sufficient to find it individually liable for injuring competition, even though the record shows Carnation was injured, not the plaintiff.

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[1]Pet changed its price February 11, and made two sales February 13; Carnation changed its price February 15, and made its first sales the same day. [Exhibit M-18, original on file with Clerk of this Court; compare R. 4779 with R. 5761, and compare R. 5224 and 5225 with R. 5779.]

CONCLUSION

In failing to "dwell long" upon the evidence as to Carnation, this Court has reached a conclusion, based on an apparent misapprehension of the facts, which effects a distortion of the dominant purpose of the antitrust laws. Instead of fostering competition, the decision has enthroned monopoly. For these reasons it is respectfully urged that rehearing be granted as to the case against Carnation.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify the foregoing Petition for Rehearing is presented in good faith and not for delay.

Counsel for Petitioner